No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy of Estate of S. A. Willen Company, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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I.

Appellee's Contention That the Validity of the Escrow Was Not Material to a Determination of the Validity of the Chattel Mortgage Herein Is Unsound.

Under Points I and II of his Opening Brief, Appellant maintained that Appellee Bank, being a party (and not a stranger) to the transaction involved herein, could not at the same time, lawfully act as escrow holder; that, accordingly, the purported escrow was invalid; that, in the absence of a valid escrow, delivery of the chattel mortgage and note was therefore made directly to the Bank in its capacity as mortgagee-escrow holder and became absolute and effective on February 4, 1953; or, alternatively, no delivery occurred at all, and thus the mortgage never became effective (Br. pp. 7-16, incl.). Answering

these contentions, Appellee maintains that it is of no consequence whether the escrow was valid or not, since a *conditional* delivery may be made directly by the mortgagor to the mortgagee without benefit of escrow (App. Br. pp. 3-15, incl.). With this position we cannot agree.

While Appellee dismisses the question of the validity of the escrow as being of "no consequence", he at the same time tacitly assumes a contrary or inconsistent position when he argues, on page 5 of his Brief, that "From a legal standpoint delivery to the mortgagee was not complete *until the mortgage was delivered out of the Bank's escrow department.*" (Emphasis supplied.) It is obvious from this statement by Appellee that he assumes a *valid* escrow to begin with, for he cannot logically predicate a *valid* delivery on an *invalid* escrow! Yet Appellee nowhere in his Brief meets the challenge of Appellant that the escrow herein "created" was invalid. Moreover, it is obvious that despite Appellee's disclaimer, he does regard the escrow as a valid one. In support of his position, he cites the case of *Citizens National Trust & Savings Bank v. Gardner,* 161 F. 2d 530 (C. C. A. 9, 1947), and argues that while he does not know if the Court in that case was called upon to determine the question whether or not the lending bank therein could at the same time act as escrow holder, the Court was certainly aware of the situation and (presumably) put the stamp of approval thereon. It is significant that Appellee does not maintain that the question of the right of the bank to act in the dual capacity of mortgagee and escrow holder was raised in the *"Citizens Bank case"*. The simple fact is that it was neither raised nor decided therein. That case is therefore of no assistance to the Court in the case at bar in determining the question. Accordingly, Appel-

lant submits that Appellee cannot "blow hot and cold" by contending at one and the same time that the validity of the escrow is of no consequence and yet assume its very validity as the foundation of his argument that the delivery of the instruments in question was not "complete" until the close of such escrow. The rule is too well established to need further authority than that already cited in Appellant's Opening Brief, that one who is a party to a transaction cannot at one and the same time act as escrow holder; and we are aware of no authority which excepts banks from this rule.

Appellant contends, further, that a chattel mortgage is not a grant or a transfer but a contract; and that a contract may be delivered conditionally (see Appellee's Summary, page 2, and Argument, pages 7-13, inclusive), and cites a number of authorities in the erroneous belief that these sustain him.

Appellant agrees that a chattel mortgage is a contract, but it does not follow therefrom that it is not also a grant or transfer. The term "contract" on the one hand, and the terms "grant" and "transfer" on the other hand are not, as Appellee seems to assume, mutually exclusive. It is true, of course, that a chattel mortgage (or any other kind of mortgage) does not transfer the *title* to the mortgaged property. However, this does not mean that a lien may not be effected by a transfer in writing. In his discussion of the term "grant" (which is discussed below) the Referee subscribed to this view. To quote from his memorandum [R. p. 22]:

> "I am aware of the term 'grant' in Sec. 1053, Civil Code. I conclude that chattel mortgages, which transfer in writing liens on personal property, come within this definition. *Rockefeller v. Smith,* 104 Cal. App. 544."

Equally specious, we believe, is Appellee's contention that a chattel mortgage is not a grant. Appellee cites *Adler v. Sargent,* 109 Cal. 42, 49, 41 Pac. 799 (1895), in support of his contention, but that case does not so hold; nor does Appellee cite any other authority to this effect. On page 9 of his Brief Appellee makes the arbitrary statement that Section 1056 of the California Civil Code relied upon by Appellant, and which provides that a grant cannot be delivered to the grantee conditionally, is not applicable to instruments "contractual in nature", but cites no competent authority to this effect. Moreover, no authority is cited by him to the effect that Section 1056 aforesaid is inapplicable to chattel mortgages. Section 1053 of said Code, cited in *Rockefeller v. Smith,* 104 Cal. App. 544, makes it abundantly clear that the term "grant" includes all instruments in writing enumerated in said Articles unless specially applied to real property (which exception is not involved in the instant situation). It is apparent that in placing a narrow or technical construction on the term "grant" Appellee is here attempting, unsuccessfully we think, to avoid the import and effect of said Section 1056, that a "grant cannot be delivered to the grantee unconditionally". The fundamental fallacy of Appellee's entire argument in this connection lies in the conclusion drawn by him that since written contracts generally may be delivered conditionally and a chattel mortgage is a contract, it too may therefore be delivered conditionally, *without taking into account any modification or exception to this rule, such as is laid down in Section 1056.* It is one thing to announce a rule. It is quite another to observe its limitations. We respectfully submit that Appellee has failed to observe them in this case.

No valid escrow having been created, and delivery of the executed chattel mortgage and note having been made on February 4, 1953, such delivery as previously argued placed the instruments in question beyond the mortgagor's power of recall, and therefore became absolute on that date.

This being true, it follows that acceptance of the chattel mortgage and note likewise became effective on that date.

II.

Appellee's Contention That There Was No Unreasonable Delay Between the Delivery and the Recordation of the Chattel Mortgage Lacks Merit.

Appellee further maintains that a delay of sixteen days (from February 4 to February 20, 1953) between the date of the delivery of the chattel mortgage and date of its recordation was not unreasonable and did not adversely affect creditors (App. Br. pp. 24-32). Whether a delay is or is not unreasonable depends on the circumstances of each particular case. As to the requirements of the California law that a chattel mortgage should be recorded promptly, if not on the date of execution and delivery. then as near to such date as possible, there can be no question. In the instant case, as pointed out in our Opening Brief (p. 3), creditors of Willen existed before February 4, 1953 and they continued to be creditors at the time of the bankruptcy. In view of this situation we believe that the Referee correctly ruled that the delay of sixteen days in the recordation of the chattel mortgage was invalid as to these creditors as well as to the Trustee in Bankruptcy. To have ruled otherwise would have sanctioned the creation of a secret lien which it is the purpose of the statute to prevent. Accordingly we are

unable to concur in the view of Appellee that the delay herein was inconsequential or reasonable.

As for the Notice of Intended Mortgage upon which Appellee places great reliance as showing that its recordation on February 5, 1953 constituted notice to creditors, our reply is that such notice was ineffective and not binding on creditors because the California law on recordation does not require creditors to search the record to ascertain any such intention to create a mortgage or to anticipate its creation.

III.

Appellee Fails to Refute Appellant's Contention That, Assuming the Debt Was Not Created Until the Money Was Paid, the Recordation of the Mortgage Prior Thereto Was Ineffective.

Under Point IV of his Brief (pp. 25-29), Appellant contends that assuming, as Appellee argues, that the chattel mortgage was not accepted until the debt was created, and that the debt was not created until the money was paid to the mortgagor, it does not follow that there was no interval or delay between acceptance of the mortgage and its recordation, as Appellee argues, since the evidence as to the date of payment does not support such contention. This evidence, as the record discloses and as Appellant pointed out in its Opening Brief (p. 28), is to the effect that the money was advanced not on February 20, 1953, but four days thereafter, on February 24, 1953; and that this fact was conceded by Mr. Kornblum who appeared for the Bank [R. p. 55]. This being the situation, the recordation of the chattel mortgage on February 20, 1953 before the date on which Appellee admits the debt was created was of no legal effect and

therefore not binding on creditors. To overcome this, Appellee purports to supplement and correct our Statement of the Case at the outset of his Brief wherein he insists that the money was paid to Willen on February 20, 1953 (and not on February 24, 1953); and that the District Court so found. In reply, we can only reiterate what the record unquestionably shows the evidence to be on this matter; and that, therefore, the purported correction of our Statement of the Case is inaccurate.

Accordingly, it is respectfully urged that the District Court's decision should be reversed and the Referee's decision reinstated.

Respectfully submitted,

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